

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	

**NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION  
INITIAL COMMENTS**

NATIONAL TELECOMMUNICATIONS  
COOPERATIVE ASSOCIATION

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## **SUMMARY**

The National Telecommunications Cooperative Association (NTCA) shares the Federal-State Joint Board on Universal Service's (Joint Board's) concern that universal service fund (USF) support for competitive eligible telecommunications carriers (CETCs) has increased dramatically since 2001 and the danger of excessive fund growth is now clear and present. NTCA also agrees with the Joint Board that the potential for uncontrollable fund growth is compounded by the calculation of support under the current portability rules. NTCA, however, strongly disagrees with the Joint Board's recommendation to limit support to primary lines as a means of controlling the future growth of high-cost support. It supports the recommendation to establish more stringent guidelines for ETC designations.

Basing universal service support on primary lines is the wrong approach to controlling the growth of the USF. The statutory purpose of the high cost universal service program is to support network infrastructure in order to ensure that telecommunications and information services in rural areas are comparable to those offered in urban areas and at affordable and comparable rates. Primary line-based support does not relate to what it actually costs a telecommunications carrier to deploy network infrastructure. Telecommunications service providers build networks that are engineered to serve an entire area and the disconnection of a line by a customer does not translate into a corresponding reduction in cost or of the obligation to serve remaining customers. If rural carriers receive support only for those lines designated as "primary" by the customer, they will not receive sufficient and predictable support that allows for the recovery of future investment to serve all customers or their costs of providing service to non-primary line customers in the high-cost area. Without sufficient and predictable support, rural consumers will ultimately not receive access to reasonably comparable services and rates as

required by the Act, 47 U.S.C. §254(b)(3).

During the last two decades, rural carriers have continued to invest in rural, high-cost and insular areas in the United States based largely on a system of rate-of-return regulation, NECA pooling, and universal service support. This existing regulatory structure has allowed the Commission to meet its Congressional mandate to ensure rural consumers access to telecommunications services at prices that are comparable to similar services and prices received by urban consumers. Current portability rules are placing a strain on support mechanisms and threatening the sustainability of universal service. Rural carriers therefore have a strong interest in ensuring that reforms to the universal service rules provide for cost recovery consistent with their past decisions to invest in networks under the then lawful regulatory rules. The Joint Board has recommended the adoption of measures to mitigate reductions attributable to the primary line proposal. However, none of the measures address the need to support investment in the network needed to serve rural consumers.

The primary line recommendation must be rejected. Also, rules that base incumbent support on embedded costs should be retained to maintain stability for the smaller companies that serve high cost areas. All lines must be included when determining a rural carrier's embedded costs. High-cost support reflects the legitimate costs of rate-of-return rural carriers serving their entire rural study areas. Without support based on these lawfully approved costs, many consumers living in rural high-cost regions of the United States would not have access to affordable and comparable telecommunications services. Any reduction in high-cost support due to limiting support to primary lines would therefore adversely affect the ability of rural carriers to deliver universal service to consumers living in rural, high-cost, and insular areas at affordable prices.

Growth in the fund can be addressed by less drastic means than a primary line restriction. Section 254(e) requires carriers receiving support to “use the support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended.” Support should be explicit and sufficient to achieve the universal service purposes of the Act. Currently, under the “identical support rule” there is no way for the FCC to ensure that CETCs receiving support on the basis of an ILEC’s cost are receiving “sufficient” universal service support. Support that is above the CETC’s cost necessarily fails the “sufficiency” test. Rate-of-return carriers are regulated in a manner that enables the Commission and the Universal Service Administrator to determine that their support is based on actual costs that are incurred for the provision of facilities used to provide services. Existing rules contain no effective means of determining whether support to a CETC has any relationship to the cost a CETC incurs in providing federally supported services. This must change now in order to prevent the growth of the high-cost universal service fund from spiraling out of control.

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INITIAL COMMENTS**

The National Telecommunications Cooperative Association (NTCA)<sup>1</sup> hereby files its initial comments in response to the Federal Communications Commission's (Commission's or FCC's) Notice of proposed Rulemaking (NPRM) seeking comment on the Recommended Decision of the Federal-State Joint Board on Universal Service (Joint Board) regarding the scope of support and the process for designating competitive eligible telecommunications carriers (CETCs).<sup>2</sup>

**I. INTRODUCTION**

The Joint Board recommended that the FCC adopt permissive federal guidelines for state commissions to consider when determining whether a carrier's designation as an ETC would be in the public interest. The Joint Board also recommended that the Commission limit the scope of high-cost support to a single connection that provides access to the public switched telephone network (PSTN). Lastly, the Joint Board declined to recommend that the Commission modify

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<sup>1</sup> NTCA is the premier industry association representing rural telecommunications providers. Established in 1954 by eight rural telephone companies, today NTCA represents 560 rural rate-of-return regulated incumbent local exchange carriers (ILECs). All of its members are full service local exchange carriers, and many members provide wireless, cable, Internet, satellite and long distance services to their communities. Each member is a "rural telephone company" as defined in the Communications Act of 1934, as amended (Act). NTCA members are dedicated to providing competitive modern telecommunications services and ensuring the economic future of their rural communities.

<sup>2</sup> *Federal-State Joint Board on Universal Service*, Notice of Proposed Rulemaking, CC Docket No. 96-45, FCC 04-127, (rel. June 8, 2004) (Portability Recommended Decision).

the basis of support in study areas with multiple ETCs and instead requested that the FCC allow the Joint Board and Commission to further consider the issue.

NTCA supports the Joint Board's recommendations concerning minimum eligibility requirements for ETC applicants, but strenuously opposes the Joint Board's recommendation to limit support to primary lines as a means of controlling the future growth of high-cost support. The statutory purpose of the high cost universal service program is to support network infrastructure in order to ensure that rural consumers have affordable access to telecommunications and information services that are comparable to those offered in urban areas. While a primary line limitation on support may reduce the demand on the USF, the proposal could have a substantial detrimental effect on the level of services and rates ultimately available in rural areas, contrary to the goals of Section 254 of the Act.<sup>3</sup>

It is NTCA's position that the only other appropriate means for controlling the future growth of the high-cost fund is to: (1) continue to permit rate-of-return rural carriers to recover their investment in the total network facilities needed to serve their rural communities; (2) establish stringent standardized eligibility requirements and public interest test for CETC applicants in rural service areas; (3) eliminate the identical support rule; (4) require all CETC universal service fund support to be based on their own costs, not the ILEC's costs; and (5) expand the base of USF contributors to include all cable, wireless and satellite providers of broadband Internet access and facilities-based and non-facilities-based VoIP and IP-enabled service providers to ensure this Nation's continued success in providing all Americans, rural and urban, access to affordable and comparable communications services.

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<sup>3</sup> Citations to the Act refer to the Telecommunications Act of 1996.

## **II. SUPPORT SHOULD BE PROVIDED BASED ON THE ACTUAL COST OF TOTAL FACILITIES TO ENSURE AFFORDABLE AND COMPARABLE RATES AND SERVICES FOR RURAL CONSUMERS AND CONTINUED INVESTMENT BY RURAL TELECOMMUNICATIONS COMPANIES**

As part of its reasoning for why the Commission should adopt a primary line limitation and cap on per-line support, the Joint Board states that “support for competitive ETCs has increased dramatically since 2001, and the danger of excessive fund growth that the Commission recognized at the time of the RTF Order is now clear and present.”<sup>4</sup> The Joint Board also states that much of the growth is caused by supported connections that supplement rather than replace wireline service and the potential of uncontrolled fund growth is compounded by the calculation of support under current rules, such as the identical support rule.<sup>5</sup> NTCA agrees with both of these points, but disagrees with the Joint Board’s proposal for addressing them. Instead of addressing these problems in a way that defeats the goal of maintaining universal service, NTCA recommends that the Commission address the identical support rule directly and adopt a rational scheme that recognizes that service is provided via networks, not lines.

NTCA acknowledge the need to control the growth of the USF. Revisions to the universal service portability rules, however, must permit rural ILECS to recover their investment in the network facilities needed to provide comparable rates and services to customers living in high-cost areas. Today’s high-cost support reflects the legitimate costs of rural ILECs serving their entire designated areas. Any reduction in high-cost support due to limiting support to primary lines would adversely affect the ability of rural carriers to continue delivering high quality, modern service at affordable rates to high-cost consumers, contrary to the universal service objectives of the Act.

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<sup>4</sup> Portability Recommended Decision, 19 FCC Rcd 4290-4291, ¶ 79.

<sup>5</sup> *Ibid.*, 19 FCC Rcd 4285-4286, ¶ 67.

**A. The mitigating measures in the recommendation defeat the statute as well as Commission policies.**

The Joint Board recommends that the Commission take steps to avoid or mitigate reductions in the amount of high cost support flowing to rural areas as a result of the primary line restriction.<sup>6</sup> However, it admits that each of the alternatives would require that the rural carrier forego support for new, non-primary lines. Given that there is no definition of what a primary line is, it is not possible to measure what portion of a rural carrier's cost of providing service will be left out of the support equation. It is therefore not possible to gauge the extent of the adverse economic impact of the primary line limitation under the Regulatory Flexibility Act.<sup>7</sup> Suffice it to say, that neither the restatement, the lump sum or the "hold harmless" proposal recognize the need to maintain support for network build-out and upgrades to meet changes in the technology and to provide adequate service to rural customers. The primary line restriction and proposals to ameliorate the its effect bode uncertainty for cost recovery by rate of return companies and ultimately condemn rural consumers to minimal service in a world of evolving telecommunications possibilities in which access to broadband is seen as essential. Investment will be stifled and the goals of Section 706 and 254 frustrated by the imposition of a primary line restriction in the context of the existing narrow definition of supported services.

**B. Rural ILECS should continue to receive support on the basis of their embedded costs to provide service throughout their study areas.**

Since the early 20<sup>th</sup> century, AT&T, the Bell Operating Companies and GTE chose not to invest in facilities to provide basic telephone service to nearly 40 percent of the geographic area of the United States. This territory consisted primarily of the most rural, insular, and sparsely populated areas in the Nation. Thin populations and difficult landscapes made these vicinities

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<sup>6</sup> Portability Recommended Decision, ¶ 72,76.

<sup>7</sup> 5 U.S.C. § 603.

too costly for large carriers to invest in and the risk of not recovering their investment was too high. Many Americans living in these areas therefore had to invest their own time, labor and money to form small subscriber-owned telephone cooperatives and community-based commercial telephone companies in order to bring service to their homes and communities.

Today, there are over 1,000 rural telephone companies serving rural America. These companies were the first and often the only companies willing to bring the latest telecommunications technology to Americans living in the remote areas of our country. This cooperative spirit that brought telephone service to rural America is the same spirit that Congress embraced when it enacted the Act so that all people of the United States, rural and urban, can have access to affordable and comparable telecommunications services.

During the last two decades, rural carriers have continued to invest in rural, high-cost and insular areas in the United States based on a system of rate-of-return regulation, NECA<sup>8</sup> pooling, and universal service support. This existing regulatory structure has allowed the Commission to meet its Congressional mandate to ensure rural consumers access to telecommunications services at prices that are comparable to similar services and prices received by urban consumers. This goal is now threatened by rules which create uncertainty about the stability of the mechanisms used to fund universal service. Rural consumers, meanwhile, continue to demand the high quality of service that they are accustomed to receiving from the carriers that have served them for decades. Rural carriers therefore have a strong interest in ensuring that reforms to the universal service rules provide for cost recovery consistent with their past decisions to invest in networks and incur costs under the then lawful regulatory rules.

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<sup>8</sup> National Exchange Carrier Association (NECA).

Serving a rural telephone company service territory is unmistakably different than serving a non-rural carrier service territory. The average population density for a rural telephone company study area is only 13 persons per square mile compared to 105 persons per square mile in non-rural carrier study areas.<sup>9</sup> Rural carriers, however, serve 93 percent of the Nation's study areas, but only eight percent of the Nation's access lines.<sup>10</sup> When comparing rural carriers among themselves there are also significant differences in study area sizes and customer bases. For example, rural telcos serving the three smallest study area groupings (2,500 lines or less) encompass 48 percent of all study areas, but only five percent of all access lines served by rural carriers.<sup>11</sup>

Each rural telecommunications company is unique and serves communities and markets that are also unique. These distinct areas include the remote woodlands in Maine and New Hampshire, small farming communities in Kansas, Iowa, Nebraska, and the Northern Plains states, insular fishing towns in Alaska, and small desert communities in Arizona, New Mexico, Texas, and Nevada. The diversity among these carriers with their varying operating conditions, small and in some cases declining population densities, and their lack of economies of scale necessitate that rural high-cost universal service support be based on the actual costs of the total facilities needed to provide service.

After two years of careful consideration and deliberation, the Rural Task Force (RTF) recommended, and the Commission and Joint Board agreed, that an embedded cost mechanism should be used for determining the amount of universal service support to rural carriers. The

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<sup>9</sup> *In the Matter of Federal-State Joint Board on Universal Service*, Rural Task Force Recommendation to the Federal-State Joint Board on Universal Service, CC Docket No. 96-45, p. 11 (rel. September 29, 2000) (RTF Recommendation).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

Commission adopted an embedded cost mechanism based in part on the RTF White Papers, which detailed the significant differences between rural carriers and non-rural carriers and the substantial diversity among rural carriers. The RTF has convincingly shown that the public will not benefit from the use of a hypothetical forward-looking economic cost (FLEC) proxy model to determine support for more than 1,000 highly diverse rural carriers. No one has yet made the case that the public will benefit by the use of a forward-looking economic cost proxy model to determine rural telephone company support.<sup>12</sup>

**C. All lines must be included in determining embedded costs.**

New regulatory policies and revised universal service portability rules must permit rate-of-return rural carriers to recover their investment in the total network facilities needed to provide comparable rates and services to customers living in rural and high-cost areas. This means that all lines must be included when determining a rural carrier's embedded costs. High-cost support reflects the legitimate costs of rate-of-return rural carriers serving their entire rural study areas, an obligation that is imposed on these companies as carriers of last resort. Without support for the entire cost of the network, many consumers living in rural high-cost regions of the United States would not have access to affordable and comparable telecommunications services. Any reduction in high-cost support due to limiting support to primary lines would adversely affect the ability of rural carriers to deliver all but a basic connection to consumers living in rural, high-cost, and insular areas. A primary line limitation will necessarily result in significant cost increases for secondary lines and unsupported business lines. Support for a single connection raises the specter of distinctly higher rates for rural consumers or the option of different levels of quality of service between urban and high cost areas.

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<sup>12</sup> See, "False Premises, False Conclusions," Dale Lehman submitted in an analysis report in CC Docket No. 96-45 (August 5, 2004).

**D. A primary line restriction will have a negative impact on broadband deployment in rural areas. Rural ILECs are the sole providers of high-quality, ubiquitous telecommunications service throughout their service territories.**

Rural telephone companies are making good on the promise to deliver broadband to rural areas.<sup>13</sup> ILECs have made significant investments in the rural high-cost portions of America under an existing universal service support system that allows for a full recovery of a sufficient portion of a carrier's embedded costs of total regulated facilities. If these costs are no longer recovered through universal service, and an alternative recovery method is not available or prohibited by regulators, then these costs will become stranded investment.<sup>14</sup>

As Commissioner Copps stated:

[i]t is essential, that any regime we adopt increase certainty so that rural carriers can plan for the future and undertake necessary investment to modernize the telecommunications infrastructure in their communities.<sup>15</sup>

Limiting support to anything less than total network facilities will halt future investment to modernize the telecommunications infrastructure in rural America and jeopardize the ability of rural carriers to service debt for plant facilities already constructed and lawfully approved by regulators.

If rural ILECs lose their incentive to invest and existing investments become stranded, some consumers living in some rural areas would very likely be deprived of basic service. As Commissioner Martin previously warned:

I am hesitant to subsidize multiple competitors to serve areas in which the costs are prohibitively expensive for even one carrier. This policy may make it difficult for any one carrier to achieve the economies of scale

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<sup>13</sup> NTCA 2004 Broadband/Internet Availability Survey Report, [www.ntca.org](http://www.ntca.org).

<sup>14</sup> The term "stranded investment" typically means plant facilities that are no longer in use and have not fully recovered their costs. However in the context of this proceeding, stranded investment can result in plant facilities that are not fully recovering their costs but are still in use.

<sup>15</sup> MAG Order, *Dissenting Statement of Commissioner Michael J. Copps*.

necessary to serve all of the customers in a rural area leading to inefficient and/or stranded investment and a ballooning universal service fund.”<sup>16</sup>

Insufficient universal service support funding would also threaten the ability of rural ILECs to offer advanced services to their customers, schools, libraries, and health care facilities. Given the Act’s goal of preserving and advancing universal service to ultimately provide consumers with access to advanced telecommunications and information services, such a result would be completely at odds with the intent of Sections 254 and 706 of the Telecommunications Act of 1996.

**E. The implementation of a primary line restriction faces significant administrative hurdles, the costs of which would far outweigh the benefits.**

The Recommended Decision rejects the possibility that a primary connection limitation is inherently unworkable.<sup>17</sup> Yet the Joint Board leaves the details of how a primary line limitation would operate in practice to the FCC, offering no concrete recommendations of their own. If there were an obvious way in which a primary line limitation could be implemented without undue burden and confusion to carriers and consumers, surely the Joint Board would have offered up at least the basic parameters of how it should work in practice. The fact that the Joint Board offers nothing in the way of guidance on how to practically implement its primary line recommendation is quite telling in that regard.

Numerous commenters in the Joint Board’s proceeding, including NTCA, detailed the many administrative difficulties that would arise under a primary line policy.<sup>18</sup> In addition, the

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<sup>16</sup> *In the Matter of the Multi-Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, CC Docket 00-256; *Federal-State Joint Board on Universal Service*, CC Docket 96-45; *Access Charge Reform for Incumbent Local Exchange Carriers Subject to Rate of Return Regulation*, CC Docket 98-77; and *Prescribing the Authorized Rate of Return for Interstate Services for Local Exchange Carriers*, CC Docket 98-166, FCC 01-304, ¶142 (rel. November 8, 2001) (*MAG Order*), *Separate Statement of Commissioner Kevin J. Martin*. (*MAG Order*), *Separate Statement of Commissioner Kevin J. Martin*.

<sup>17</sup> Portability Recommended Decision, 19 FCC Rcd 4291-4292, ¶ 81.

<sup>18</sup> See, Portability Recommended Decision, 19 FCC Rcd 4291, fn. 222.

Joint Statement of Commissioners Adelstein, Thompson, and Rowe provides an excellent overview of the numerous administrative hurdles and issues that would need to be addressed before a primary line limitation could be implemented.<sup>19</sup>

For instance, even the seemingly simple task of defining the term “primary line” is problematic. If the definition is based on a household, how would residences with unrelated individuals be treated (ex. college roommates or families who take in boarders)? If the definition is based on an individual, what would stop a family from placing each of the lines it subscribes to under a different family member’s name, so that they are all classified as primary?

Regardless of how a primary line is defined, when consumers in high-cost areas see the difference in rates between supported primary lines and unsupported non-primary lines, surely many will act in their self-interest, and “game” the system in a way that maximizes the number of discounted lines that they receive. Even if this abuse could be minimized through carrier enforcement, it is not the role of carriers to pry into the private living arrangements of their customers. Moreover, any type of “policing” system would likely be costly and onerous for small carriers to implement and divert resources away from infrastructure investment and quality customer care. It would also serve to ruin the goodwill that rural carriers have earned from their customers.

Furthermore, it does not serve the public interest to create an environment for ETCs that is similar to the market for long distance, where carriers will resort to marketing gimmicks (ex. sending checks in the mail that result in a change of service provider when cashed) in order to get consumers to choose them as their primary line provider. The Joint Board states that they do not believe that competition for primary designations would disserve the public interest by

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<sup>19</sup> Joint Separate Statement, 19 FCC Rcd 4323.

diverting ETCs' resources from infrastructure investment to marketing and promotion.<sup>20</sup> NTCA disagrees. Carriers should not have to resort to these types of gimmicks in order to receive the necessary funding for continued network infrastructure investment. It would not serve the public interest to have a high level of "churn" among carriers vying to be a customer's designated primary line provider, when this would directly impact the support levels these carriers receive. This would result in highly unstable carrier support levels that would disincent carriers from making long-term investments. This type of environment certainly does not engender the predictability and sufficiency of support that Congress called for in Section 254. In addition, as Commissioners Adelstein, Thompson, and Rowe correctly point out, "[p]ast problems with slamming in long distance competition will pale in comparison to those that could arise when carriers can collect funding for winning primary line designations."<sup>21</sup>

Lastly, the Recommended Decision states that rules distinguishing between primary and other connections are not unprecedented.<sup>22</sup> This is true, yet what the Joint Board does not mention is that the Commission's most recent attempt at crafting a workable primary/non-primary line distinction failed and was subsequently abandoned. Specifically, after adopting a policy of different primary and non-primary rates for price cap carriers' subscriber line charges (SLCs) in 1997, the Commission terminated the policy only three years later after observing the significant difficulties the price cap carriers were having with implementation and policing. When the Commission terminated the policy in 2000, it stated that getting rid of the primary/non-primary line distinction "will go a long way to eliminate the customer confusion

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<sup>20</sup> Portability Recommended Decision, 19 FCC Rcd 4292, ¶ 82.

<sup>21</sup> Joint Separate Statement, 19 FCC Rcd 4323-4324.

<sup>22</sup> Portability Recommended Decision, 19 FCC Rcd 4291-4292, ¶ 81.

that now exists” and “eliminate the costs associated with administering the distinction, which are ultimately borne by customers.”<sup>23</sup>

Having learned from this experience, the FCC wisely declined to adopt a primary/non-primary line distinction for rate-of-return carriers, taking into consideration that the administrative burdens would be even greater for small rate-of-return carriers than for price cap carriers.<sup>24</sup> The FCC should not forget the lessons learned from the debacle created by primary/non-primary line SLCs and reject such a policy for universal service, which would have far more dire consequences. NTCA concurs with Commissioners Adelstein, Thompson, and Rowe that any potential gains from restricting funding to primary lines will likely be outweighed by the administrative costs and the risks that necessarily follow an unauditable restriction.<sup>25</sup>

### **III. THE COMMISSION CAN CONTROL THE GROWTH OF THE FUND AND ENSURE “SUFFICIENT” SUPPORT WITHOUT IMPOSING A DESTRUCTIVE PRIMARY LINE RESTRICTION**

#### **A. The primary goal of Sections 151 and 254 is to ensure that consumers in rural and high cost areas receive telecommunications and information services that are comparable in quality and rates to those received by consumers in urban areas.**

The rules under which high-cost support are presently administered distort and frustrate the Congressional policies embedded in Sections 251 and 254 of the Act.<sup>26</sup> Under the present

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<sup>23</sup> *Access Charge Reform Order, Price Cap Performance Review for Local Exchange Carriers*, CC Docket Nos. 96-262 and 94-1, Sixth Report and Order, *Low-Volume Long Distance Users*, CC Docket No. 99-249, Report and Order, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Eleventh Report and Order, 15 FCC Rcd 12962, 13002, ¶ 100 (2000) (CALLS Access Charge Reform Order).

<sup>24</sup> *Multi-Association Group (MAG) Plan Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, CC Docket No. 00-256, Second Report and Order and Further Notice of Proposed Rulemaking, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Fifteenth Report and Order, *Access Charge Reform for Incumbent Local Exchange Carriers Subject to Rate-of-Return Regulation*, CC Docket No. 98-77, Report and Order, *Prescribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers*, CC Docket No. 98-166, Report and Order, 16 FCC Rcd 19613, 19636, ¶ 47 (2001).

<sup>25</sup> Joint Separate Statement, 19 FCC Rcd 4323.

<sup>26</sup> 47 U.S.C. § 251 provides that all Americans, so far as possible, should have access to telecommunications services at reasonable charges. 47 U.S.C. § 254.

regime, the goal of delivering comparable services at comparable rates in high-cost areas has been lost and sacrificed to the misguided program of using high-cost universal service support to artificially manufacture competition. The Joint Board recommendation perpetuates this misguided regime by ignoring the fact that the real cause of the ballooned fund is the identical support rule. The Commission must address this rule in a comprehensive way. Embracing the primary line restriction will not resolve the legal and policy issues that have resulted from the misguided notion that high cost support is intended to foster competition instead of ensuring comparable rates and services in urban and rural areas.

The Commission must look beyond the recommendations of the Joint Board in this single proceeding and consider the potential impact of the identical support rule as well as the primary line restriction on evolving services that are likely to be deployed widely in urban areas. It cannot be assumed that evolving services will emerge in high-cost areas merely as a result of introducing multiple CETCs and, as discussed above, it is likely that a primary line restriction will curb investment in the highest cost rural areas.

**B. In lieu of a primary line restriction, the Commission can adopt a requirement that CETC support must be based on CETC costs, not ILEC costs.**

Section 254(e) requires that support be used “only for the provision, maintenance, and upgrading of the facilities and services for which the support is intended” and “[a]ny such support should be explicit and sufficient to achieve the purposes of this section.”<sup>27</sup> Congress thus contemplated restrictions on both the use and level of support. The United States Court of Appeals for the 5<sup>th</sup> Circuit has already warned: “excessive funding may itself violate the sufficiency requirement of the Act.”<sup>28</sup> By failing to establish a relationship between a carrier’s

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<sup>27</sup> 47 U.S.C. § 254(e).

<sup>28</sup> *Id.*

cost and the support the carrier receives, existing rules distort and ignore the notion of “sufficiency.” The concept of competitive neutrality is viewed as the justification for the identical support rule and abandonment of the 254(e) requirement that support must be “explicit and sufficient”.

With the passage of time it has become clear that providing the ILEC’s per line support to all ETCs, regardless of their cost structure or their regulatory status, defeats the Commission’s guiding principle of “competitive neutrality.” Commission’s rules now permit CETCs to receive ILEC per line support for every working loop they serve in the ILEC’s service area, regardless of whether the CETC’s costs to provide service are below the national benchmark to qualify for support. CETCs that have no loops, *per se*, are treated as if they did. Thus, wireless carriers are allowed to substitute customer-billing addresses for loops and to receive ICLS based on a support mechanism designed to recover the common line cost of ILECs.<sup>29</sup>

In addition, CETCs that purchase unbundled network elements (UNEs) are first, allowed to treat leased facilities as their “own” despite Section 214(e)(1)(A), and second, allowed to recover in excess of their costs.<sup>30</sup> These rules advantage classes of carriers by allowing them to receive support unrelated to their costs. The rules are not competitively neutral because classes of CETCs are held to a lower service standard than the incumbents. The rules have undeniably become the basis for unfair competition in high-cost rural service areas and the critical instrument used by CETCs for gaming universal service support dollars that have no relationship to their cost of providing service.

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<sup>29</sup> NTCA Petition for Reconsideration in the Multi-Association Group (MAG) Order, CC Docket 00-256 (December 31, 2001).

<sup>30</sup> *In the Matter of ACS of Fairbanks, Inc., Petition for Declaratory Ruling and Other Relief Pursuant to Section 254(e) of the Communications Act, as Amended*, CC Docket No. 96-45, DA 02-1853, Public Notice (rel. August 2, 2002).

#### **IV. A MEANINGFUL “PUBLIC INTEREST” TEST SHOULD BE DEVELOPED AND APPLIED IN DESIGNATIONS THAT AFFECT RURAL AREAS**

In adopting the 1996 Act, Congress recognized that areas served by rural telephone companies are different than those served by larger carriers. Congress favored competition, but recognized that introducing competition into areas that cannot otherwise support competition would ultimately harm consumers. For this reason, Section 214(e)(6) specifically requires that there must be a finding of the “public interest” before an additional ETC is designated in an area served by a rural telephone company. Thus, while a state commission must designate other eligible carriers for non-rural areas, states and the Commission (when it acts instead of the state), may only designate additional eligible carriers for areas served by a rural telephone company upon a specific finding that such a designation is in the public interest.

The Joint Board has addressed this problem by recommending permissive federal ETC guidelines for state commissions to consider in ETC designation proceedings. It recognizes that the unchecked designation of multiple ETCs create a potential for uncontrolled growth of the fund.<sup>31</sup> The recommended guidelines are intended to assist state regulators in determining whether an ETC designation is in the public interest. The guidelines are also intended to improve the long-term sustainability of the USF by only allowing fully qualified carriers that are capable of, and committed to, providing universal service to be able to receive high cost support. NTCA applauds the Joint Board’s efforts in strengthening the ETC eligibility requirements and supports the adoption of the following guidelines, which include the Joint Board’s recommendations as well as others.

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<sup>31</sup> Portability Recommended Decision, ¶ 67.

**A. The applicant must demonstrate that it has adequate financial resources in order to provide quality services throughout the ETC designated service area.**

The first ETC guideline recommended by the Joint Board and supported by NTCA would encourage state commissions to evaluate whether ETC applicants have the financial resources and ability to provide quality services throughout the designated service area.<sup>32</sup> NTCA shares the Joint Board's concern that it would neither be prudent nor serve the public interest if a financially unsound carrier is designated as an ETC, receives universal service, and yet is still unable to achieve long-term viability that is sufficient to sustain its operations and ensure the continuation of service to rural consumers. The public interest would be better served by carefully reviewing the financial resources of an ETC applicant to assist in ensuring that the applicant is capable of sustaining their operations for the long-term.

In particular, the FCC and state commissions should use this guideline to evaluate those applicants who are using the rules for regulatory arbitrage or as a means to prop-up communications businesses based solely on the use of universal service support. High cost support should not be used to create artificial competition in rural areas. Its use is intended to ensure that support is used to provide comparable rates and services in urban and rural areas in accordance with the principles of Section 254. As Professor Dale Lehman correctly states:

Artificially induced competition in rural areas serves to undermine the already weak business case for broadband deployment. It threatens the revenue base for [rural carriers] but does not reduce the investments required to provide service [and continue to meet carrier of last resort obligations]. ... Universal service should not be used to induce competition. Entry will occur where market conditions permit it.<sup>33</sup>

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<sup>32</sup> Portability Recommended Decision, ¶ 22

<sup>33</sup> *The Cost of Competition*, by Dale Lehman, Paper 3 of the NTCA 21<sup>st</sup> Century White Paper Series, p. 3 (December 2000). Dale Lehman is currently the Director of the MBA in Telecommunications Program at Alaska Pacific University. He has a Ph.D. in Economics from the University of Rochester. He is also coauthor (with Dennis Weisman) of *The Telecommunications Act of 1996: The "Costs" of Managed Competition*, Kluwer Academic Publishers (September 2000).

The Commission should adopt this guideline as a means to weed out financially unsound companies from taking support to boot strap unsound operations. It makes no sense to waste scarce resources by designating a carrier that does not have the financial strength to make a long-term commitment.

**B. The applicant must demonstrate its commitment and ability to provide the supported services throughout the ETC designated service area to all customers who make a reasonable request for service.**

As Commissioner Abernathy's has emphasized "an ETC must be prepared to serve all customers upon reasonable request and it must offer high-quality services at affordable rates throughout the designated service area."<sup>34</sup> NTCA agrees and supports the Joint Board's proposed ETC guideline that would encourage state commissions to require ETC applicants to demonstrate their capability and commitment to provide service throughout the designated service area to all customers who make a reasonable request.<sup>35</sup>

ETC applicants should be required, as part of the demonstration of their commitment to provide service throughout the designated service area, to file a formal build-out plan for areas where facilities have not yet been built-out. A formal build out plan is critical because provisioning a network that can serve all of the customers within the designated service area goes to the heart of what it means to be an ETC. A build-out plan should include a reasonable schedule with target completion dates for each specific build-out project that will lead to the building of a network that will provide coverage to 100 percent of the ETC applicant's designated area. The build-out schedule will allow regulators to monitor the progress of the construction of the network and determine whether or not the ETC is meeting the goals that ETC

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<sup>34</sup> Portability Recommended Decision, Separate Statement of Commission Kathleen Abernathy, ¶ 2.

<sup>35</sup> *Ibid.*, 19 FCC Rcd 4266-4269, ¶¶ 23-29.

has agreed to. By monitoring the build-out, regulators can ensure that ETCs are using support for the purpose intended as required by Section 254(e) of the Act.

**C. The ETC applicant must demonstrate its ability to remain functional in emergency situations.**

The Joint Board also recommended that the Commission adopt a guideline to require ETC applicants to demonstrate the ability to remain functional in emergency situations. The Joint Board stated that this is an important guideline because the “security of a carrier’s network and the ability to protect critical telecommunications infrastructure should be a major consideration in evaluating the public interest.”<sup>36</sup> NTCA agrees. Regulators should evaluate the applicant’s ability to function without an external power source, reroute traffic around damaged facilities, handle traffic spikes, etc. An ETC applicant’s ability to remain functional in emergencies is essential to public safety and national security and should be considered as part of a public interest determination.

**D. Regulators must continue to analyze whether or not an ETC designation for a service area less than the study area of a rural telephone company would allow creamskimming by allowing the applicant to serve only the low-cost, high revenue customers in a rural telephone company’s service area.**

The Joint Board recommended that even though rural telephone companies are now allowed to disaggregate support, the Commission should continue to support the procedures established in 1997 for redefinition of rural service areas.<sup>37</sup> NTCA supports this recommendation. Section 214 (e)(5) of the Act implicitly acknowledges that study area wide service and support to companies willing to provide service throughout the rural telephone company study areas is most consistent with the goals of the Act. It recognizes that a “quid pro quo” of designation in rural areas is the willingness to provide ubiquitous service and assume the

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<sup>36</sup> Portability Recommended Decision, ¶ 30.

<sup>37</sup> Recommended Decision, ¶¶ 80 – 86.

obligations that are entailed thereby. This is likely the reason for the requirement that both the Commission and state commission agree to a different definition, after taking into account the recommendations of a Federal-State Joint Board.

When the Joint Board evaluated this issue in 1996, it recommended that the Commission retain the current study areas of rural telephone companies as the service areas for such companies, and that smaller service areas be designated only upon careful analysis of the creamskimming potential of the application.<sup>38</sup> The current Joint Board recommends that these procedures remain in place. The Commission should reaffirm its support for the Joint Board's position that study area wide service should be the norm in rural study areas. Maintaining the requirement for creamskimming analysis is consistent with the Commission's recent decision denying ETC designation to a wireless carrier, which with a license area covering only the low cost portion of a rural telephone company's study area.<sup>39</sup> Before granting ETC designation to a carrier at below the study area level, the state commission or FCC must determine that such a designation is in the public interest, consistent with the principles of universal service. The mere introduction of competition, or that the belief that such designation is the only way for the competitor to receive ETC designation, is not reason enough. The consumers situated in the rural ILECs remaining service area may be irreparably harmed. The Section 214 "throughout study area" language contemplates ubiquitous service for consumers and a level playing field for all competitors.

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<sup>38</sup> *Federal-State Joint Board on Universal Service, Recommended Decision*, CC Docket No. 96-45, 12 FCC Rcd 87, 179-180 (1996). Creamskimming occurs when competitors serve only the low-cost, high revenue customers in a rural telephone company's service area, thereby undercutting the rural ILEC's ability to undercut the incumbent's ability to provide service throughout the study area.

<sup>39</sup> *In the Matter of Federal-State Joint Board on Universal Service, Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, CC Docket No. 96-45, FCC 03-338 (rel. January 22, 2004), ¶¶ 32-35.

**E. Regulators may choose to impose consumer protection requirements as a precondition for designation as a CETC.**

The last ETC guideline that the Joint Board recommended was that state commissions may impose consumer protection requirements as part of the ETC designation process. NTCA supports this guideline. Imposing consumer protection requirements as part of the ETC designation process is consistent with “the public interest, convenience and necessity” to ensure that consumers are able to receive high quality, affordable and reasonably comparable services and rates.

**F. The applicant must demonstrate its commitment to utilize the funding it receives only to support infrastructure and supported services within the ETC designated service area.**

NTCA recommends as an additional ETC guideline that all ETC applicants be required to demonstrate their commitment to utilize universal service support specifically for infrastructure and supported services within the ETC’s designated service area. In two recent ETC designation proceedings conducted by the FCC, the Commission took a step in the right direction by stating that it may institute an inquiry on its own motion to examine any ETC’s records and documentation to ensure that the high cost support the ETC receives is being used for its intended purposes and in the areas where it is designated. In addition, the FCC stated that designated carriers will be required to provide such records and documentation to the Commission and USAC upon request.<sup>40</sup>

Section 254(e) requires carriers receiving support to “use the support only for the provision, maintenance, and upgrading of facilities and services for which the support is

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<sup>40</sup> Virginia Cellular, LLC *Petition for Designation as an Eligible Telecommunications Carrier Throughout its Licensed Service Area in the Commonwealth of Virginia*, Memorandum and Order, ¶ 46, CC Docket No. 96-45, 19 FCC Rcd 1563, 1584-1585, ¶ 46 (2004) (Virginia Cellular). *See also*, Highland Cellular, Inc., *Petition for Designation as an Eligible Telecommunications Carrier Throughout its Licensed Service Area in the Commonwealth of Virginia*, Memorandum and Order, 19 FCC Rcd 6422, 6441-6442, ¶ 43 (2004) (Highland Cellular).

intended.” Since the support received by rural ILECs is based almost entirely on their own actual past investments and expense payments, or reductions in other rates, its easy to determine that the support has been used to provide the supported services within the rural ILEC’s designated service area. However, there is no way to ensure that CETCs receiving support based on the incumbent’s costs are using the support for its intended purposes. Further, there is no automatic way of determining that support is being used in the area for which non-ILECs are designated.

Presently, CETCs are only required to file a letter with USAC certifying that the support they receive is being used for intended purposes. They are not required to perform cost studies or provide any information about their infrastructure, build-out plans or costs. A CETC’s certification letter does not provide the essential information necessary to determine if support is used to provide the supported services in the CETC’s designated service area. The public interest requires more than an assumption that CETCs will use their support on infrastructure and supported services within the ETC designated service area. NTCA therefore recommends that the Commission adopt an additional ETC guideline that requires all ETC applicants to demonstrate their commitment to utilize universal service support specifically for infrastructure and supported services within the ETC’s designated service area.<sup>41</sup>

**G. Regulators must consider the impact of the designation on the size and sustainability of the Universal Service Fund.**

The Joint Board declined to recommend a specific cost-benefit test for the purpose of making public interest determinations under Section 214(e)(2). The Joint Board, however, did

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<sup>41</sup> For example, in a decision by the Vermont Public Service Board designating wireless carrier RCC Atlantic as an ETC, the Board required RCC to file periodic reports to ensure that their support is devoted to the purposes intended. Specifically, RCC must demonstrate that its capital spending in Vermont is at least equal to its federal support in Vermont, plus a reasonable base level of spending. See, State of Vermont Public Service Board, *In re: Designation of Eligible Telecommunications Carriers Under the Telecommunications Act of 1996 (In re: RCC Atlantic, Inc. d/b/a Unicel)*, Docket No. 5918 (Nov. 14, 2003), p. 36.

recommend that state commissions consider the level of high-cost per-line support to be received by ETCs. NTCA believes the Commission should adopt a guideline that calls for a cost benefit analysis. The guideline would provide that regulators should consider the overall level of per-line support provided to a specific service area. If the per-line support level is high enough in a specific service area, the state commission or the FCC may be justified in limiting the number of ETCs in that study area, because funding multiple ETCs in such areas could impose strains on the USF.

The Commission has become increasingly concerned about the impact on the USF due to the rapid growth in high-cost support distributed to CETCs.<sup>42</sup> NTCA shares this concern. Commissioner Martin's states that supporting multiple competitors in areas that are prohibitively expensive for even one provider "may make it difficult for any one carrier to achieve the economies of scale necessary to serve all of the customers in a rural area, leading to inefficient and/or stranded investment and a ballooning universal service fund."<sup>43</sup> Thus, it is critical that the USF be treated by state commissions and the FCC as a scarce national resource and be carefully managed to serve the public interest. Otherwise, the Fund will grow to an unsustainable level and ultimately leave no carrier with sufficient support to provide universal service.

State commissions and the FCC should examine whether additional ETCs in an area will ultimately have an adverse effect on affordability of rates and quality of service, contrary to universal service principles.<sup>44</sup> If a carrier's network costs cannot continue to be recovered through universal service, other revenue sources will need to be pursued, including local rate increases that could quickly exceed affordable levels. Moreover, absent sufficient universal

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<sup>42</sup> Virginia Cellular, 19 FCC Rcd 1577-1578, ¶ 31.

<sup>43</sup> MAG Plan Second Report and Order, Separate Statement of Commissioner Kevin J. Martin, 16 FCC Rcd 19770.

<sup>44</sup> See 47 U.S.C. § 254(b)(1).

service support, carriers will have less incentive to make needed plant upgrades, causing service quality to decline.

Regulators should also consider whether additional ETCs in rural service areas would promote the deployment of advanced services or another universal service principle.<sup>45</sup>

Artificially induced competition in rural service areas serves to undermine the already weak business case for the deployment of new, costly services by rural telephone companies. It threatens the revenue base for these carriers but does not reduce the investments required to provide service. Furthermore, since rural ILECs continue to have a “carrier of last resort” obligation, they must continue to maintain the telephone plant necessary to meet this obligation. As a result, multiple CETCs in rural service areas and deployment of advanced services may be in conflict.<sup>46</sup> This is a valid factor that affects rural consumers’ access to advanced services and should be considered in the designation process.

The Act also provides that consumers in rural and high cost areas should have services and rates comparable to urban areas.<sup>47</sup> It does not, however, guarantee that areas served by rural telephone companies have the same number of supported providers as non-rural service areas. Just the opposite, Congress considered the possibility that supporting multiple carriers may not be in the best interest of consumers in rural service areas and thus required regulators to conduct a public interest analysis before designating an additional ETC. Therefore, rather than simply granting additional ETC designations, the state commissions and the FCC must also look at whether support will in fact promote comparability between rural and urban areas. As

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<sup>45</sup> See 47 U.S.C. § 254(b)(2).

<sup>46</sup> See Lehman, Dale, *The Cost of Competition*, Paper 3 of the NTCA 21st Century White Paper Series (December 2000). See also, Speech by Commissioner Jonathan Adelstein, “Meeting the Challenges of Rural Telecommunications,” OPASTCO 2003 Legislative and Regulatory Conference, Washington, DC (March 5, 2003): “[U]nless universal service works the right way, rural America will lack the foundation we need to speed broadband deployment.”

<sup>47</sup> See 47 U.S.C. § 254(b)(3).

Commission Adelstein recognized, “[those performing the public interest analysis] also need to consider whether the new service proposed is an enhancement or an upgrade to already existing or currently available service.”<sup>48</sup>

Congress sought to have specific, predictable, and sufficient Federal and State mechanisms to preserve and advance universal service.<sup>49</sup> Therefore, it is incorrect for regulators to ignore the ultimate sustainability of the high cost universal service program as they consider CETC applications for rural service areas.

**V. THE COMMISSION SHOULD RECOGNIZE THAT IT WILL NEED TO EXPAND THE BASE OF USF CONTRIBUTORS TO INCLUDE CABLE, WIRELESS AND SATELLITE PROVIDERS OF BROADBAND INTERNET ACCESS AND FACILITIES-BASED AND NON-FACILITIES-BASED VOIP AND IP-ENABLED SERVICE PROVIDERS**

The Commission has the authority to expand the number and types of contributors to the fund to ensure “sufficient” support to achieve the goals of the Act. NTCA believes that the time is ripe for the Commission to expand the list of contributors to include both facilities-based and non-facilities-based VoIP/IP-enabled service providers and all cable, wireless and satellite providers of broadband Internet access and other providers that connect to or benefit from connection to the public, regardless of the classification of the service as an information service, telecommunications service or private carriage service. The universe of “telecommunications carriers” and providers of telecommunications and the share of new providers’ markets have expanded far beyond the boundaries that existed when the Commission first identified contributors to universal service. It is time to expand the base of contributors to ensure contributions on an equitable and nondiscriminatory basis pursuant to Section 254(d). A

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<sup>48</sup> Speech by Commissioner Jonathan Adelstein, “Rural America and the Promise of Tomorrow,” NTCA Annual Meeting & Expo, Phoenix, Arizona (February 3, 2003).

<sup>49</sup> 47 U.S.C. § 254(b)(5).

reexamination will ensure that the Commission does not act precipitously in adopting the primary line restriction as the total cure for maintaining the viability of the fund.

## **VI. CONCLUSION**

For the above reasons, NTCA urges the Commission to reject the Joint Board recommendation on “primary lines” and adopt its recommendation to establish more stringent ETC guidelines. Also, NTCA recommends that the Commission protect the long term viability of the fund and adhere to Section 254’s requirement of “comparability” and sufficiency by: (1) continuing to permit rate-of-return rural carriers to recover their investment in the total network facilities needed to serve their rural communities; (2) establishing stringent standardized eligibility requirements and public interest test for CETC applicants in rural service areas; (3) eliminating the identical support rule; (4) requiring all CETC universal service fund support to be based on their own costs, not the ILEC’s costs; and (5) expanding the base of USF contributors to include all cable, wireless and satellite providers of broadband Internet access and facilities-based and non-facilities-based VoIP and IP-enabled service providers.

Respectfully submitted,

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